

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEPHANIE K. VASSER
Claimant

VS.

OHSE MEAT PRODUCTS, INC.
Respondent
Self-Insured

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Docket No. 192,099

ORDER

Claimant appeals from a Preliminary Order entered by Administrative Law Judge James R. Ward on May 26, 1995.

ISSUES

The issue to be considered on appeal is whether the Administrative Law Judge has discretion and authority to refuse to conduct a preliminary hearing based upon information contained in or attached to the Notice of Intent and Application for Preliminary Hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By amendments effective July 1, 1993 the Legislature added certain requirements for exchange of information prior to a preliminary hearing. See K.S.A. 44-534a. In this case, the Administrative Law Judge has concluded from the information exchanged prior to the preliminary hearing that claimant could not, under any theory, prevail at the preliminary hearing. The Appeals Board finds, however, that the Administrative Law Judge does not have the discretion to refuse to conduct a preliminary hearing at which, as a minimum, the parties must be permitted to make a proffer of the evidence to be presented.

K.S.A. 44-534a provides:

"If the issues cannot be resolved by the benefit review conference, the director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing."

The use of the term "shall" in the statute makes the hearing mandatory. Provisions for exchange of information prior to that hearing are intended to facilitate settlement by agreement of the parties. They are not intended as discovery for summary judgement. Once the procedural requirements are met, the hearing must be held.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Order of Administrative Law Judge James R. Ward dated May 26, 1995 should be and the same is hereby reversed. The action is remanded to the Administrative Law Judge with directions to provide notice and conduct a hearing as required by K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of August.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, Kansas
Patrick Salsbury, Topeka, Kansas
James R. Ward, Administrative Law Judge
Philip S. Harness, Director